

SENATE BILL NO. 342

INTRODUCED BY LASLOVICH, BRUEGGEMAN

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4 A BILL FOR AN ACT ENTITLED: "AN ACT CREATING AN ALTERNATIVE PROJECT DELIVERY CONTRACT  
5 PROCESS FOR CERTAIN CONSTRUCTION PROJECTS OF STATE AGENCIES AND CERTAIN LOCAL  
6 GOVERNMENTS; ESTABLISHING REQUIREMENTS THAT MUST BE MET IN ORDER TO USE AN  
7 ALTERNATIVE PROJECT DELIVERY CONTRACT; REQUIRING JUSTIFICATION FOR AN ALTERNATIVE  
8 PROJECT DELIVERY CONTRACT; REQUIRING A STATE AGENCY OR CERTAIN LOCAL GOVERNMENTS  
9 THAT USE AN ALTERNATIVE PROJECT DELIVERY CONTRACT TO STATE THE REASONS FOR  
10 SELECTING THE CONTRACTOR SELECTED; AND AMENDING SECTIONS 7-5-2301, 7-5-4302, 18-1-102,  
11 18-2-103, 18-4-124, 20-6-606, 20-9-204, AND 67-11-201, MCA."

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13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
14

15 NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 3], unless the context clearly  
16 requires otherwise, the following definitions apply:

17 (1) "Alternative project delivery contract" means a construction management contract, a general  
18 contractor construction management contract, or a design-build contract.

19 (2) "Construction management contract" means a contract in which the contractor acts as the public  
20 owner's construction manager and provides leadership and administration for the project, from planning and  
21 design, in cooperation with the designers and the project owners, to project startup and construction completion.

22 (3) "Contractor" has the meaning provided in 18-4-123.

23 (4) "Design-build contract" means a contract in which the designer-builder assumes the responsibility  
24 and the risk for architectural or engineering design and construction delivery under a single contract with the  
25 owner.

26 (5) "General contractor construction management contract" means a contract in which the general  
27 contractor, in addition to providing the preconstruction, budgeting, and scheduling services, procures necessary  
28 construction services, equipment, supplies, and materials through competitive bidding contracts with  
29 subcontractors and suppliers to construct the project.

30 (6) "Governing body" means the legislative authority of:

1 (a) a municipality, county, or consolidated city-county established pursuant to Title 7, chapter 1, 2, or  
2 3;

3 (b) a school district established pursuant to Title 20; or

4 (c) an airport authority established pursuant to Title 67, chapter 11.

5 (7) "Project" means any construction or any improvement of the land, a building, or another  
6 improvement that is suitable for use as a state or local governmental facility.

7 ~~(8) "PUBLISH" MEANS PUBLICATION OF NOTICE AS PROVIDED FOR IN 2-3-104, 7-1-2121, 7-1-4127, 18-2-301,~~  
8 AND 20-9-204.

9 ~~(8)(9)~~ "State agency" has the meaning provided in 2-2-102, except the department of transportation,  
10 provided for in 2-15-2501, is not considered a state agency.

11  
12 **NEW SECTION. Section 2. Alternative project delivery contract -- authority -- criteria.** (1) Subject  
13 to the provisions of [sections 1 through 3], a state agency or a governing body may use an alternative project  
14 delivery contract. A state agency or governing body that uses an alternative project delivery contract shall:

15 (a) demonstrate that the state agency or the governing body has or will have knowledgeable staff or  
16 consultants who have the capacity to manage an alternative project delivery contract;

17 (b) clearly describe the manner in which:

18 (i) the alternative project delivery contract award process will be conducted; and

19 (ii) subcontractors and suppliers will be selected.

20 (2) Prior to awarding an alternative project delivery contract, the state agency or the governing body  
21 shall determine that the proposal meets at least two of the sets of criteria described in subsections (2)(a) through  
22 (2)(c) and the provisions of subsection (3). To make the determination, the state agency or the governing body  
23 shall make a detailed written finding that:

24 (a) the project has significant schedule ramifications and using the alternative project delivery contract  
25 is necessary to meet critical deadlines by shortening the duration of construction. Factors that the state agency  
26 or the governing body may consider in making its findings include, but are not limited to:

27 (i) operational and financial data that show significant savings or increased opportunities for generating  
28 revenue as a result of early project completion;

29 (ii) demonstrable public benefits that result from less time for construction; or

30 (iii) less or a shorter duration of disruption to the public facility.

1 (b) by using an alternative project delivery contract, the design process will contribute to significant cost  
 2 savings. Significant cost savings that may justify an alternative project delivery contract may derive from but are  
 3 not limited to value engineering, building systems analysis, life cycle analysis, and construction planning.

4 (c) the project presents significant technical complexities that necessitate the use of an alternative  
 5 delivery project contract.

6 (3) The state agency or the governing body shall make a detailed written finding that using an  
 7 alternative project delivery contract will not:

8 (a) encourage favoritism or bias in awarding the contract; or

9 (b) substantially diminish competition for the contract.

10

11 **NEW SECTION. Section 3. Alternative project delivery contract -- award criteria.** (1) (A) Whenever  
 12 a state agency or a governing body determines, pursuant to [section 2], that an alternative project delivery  
 13 contract is justifiable, the state agency or the governing body shall publish an advertisement requesting A  
 14 REQUEST FOR qualifications and proposals AS DEFINED IN 60-2-134. AT A MINIMUM, PUBLICATION OF THE REQUEST  
 15 FOR QUALIFICATIONS MUST BE AN ADVERTISEMENT RUNNING FOR AT LEAST 3 WEEKS IN EACH NEWSPAPER OF GENERAL  
 16 CIRCULATION THAT IS PUBLISHED AT LEAST WEEKLY AND THAT IS CIRCULATED WITHIN THE STATE, WITH RESPECT TO STATE  
 17 AGENCY REQUESTS, OR WITHIN THE LOCAL AREA, WITH RESPECT TO A REQUEST BY A GOVERNING BODY.

18 (B) AFTER EVALUATING THE RESPONSES TO THE REQUEST FOR QUALIFICATIONS, A REQUEST FOR PROPOSALS  
 19 MUST BE SENT TO EACH RESPONDENT THAT MEETS THE QUALIFICATION CRITERIA SPECIFIED IN THE REQUEST FOR  
 20 QUALIFICATIONS. The request for proposals must clearly describe the project, the state agency's or the governing  
 21 body's needs with respect to the project, the requirements for submitting a proposal, criteria that will be used to  
 22 evaluate proposals, and any other factors, including any weighting, that will be used to award the alternative  
 23 project delivery contract.

24 (2) The state agency's or the governing body's decision to award an alternative project delivery contract  
 25 must be based, at a minimum, on:

26 (a) the applicant's:

27 (i) history and experience with projects similar to the project under consideration;

28 (ii) financial health;

29 (iii) staff or workforce that is proposed to be committed to the project;

30 (iv) approach to the project; and

1 (v) ~~fees~~ PROJECT COSTS; and

2 (b) any additional criteria or factors that reflect the project's characteristics, complexities, or goals.

3 (3) UNDER ANY CONTRACT AWARDED PURSUANT TO [SECTIONS 1 THROUGH 3], ARCHITECTURAL SERVICES MUST  
 4 BE PERFORMED BY AN ARCHITECT, AS DEFINED IN 37-65-102, AND ENGINEERING SERVICES MUST BE PERFORMED BY A  
 5 PROFESSIONAL ENGINEER, AS DEFINED IN 37-67-101.

6 ~~(3)~~(4) At the conclusion of the selection process, the state agency or the governing body shall state and  
 7 document in writing the reasons for selecting the contractor that was awarded the contract. The documentation  
 8 must be provided to all applicants and to anyone else, upon request.

9 ~~(4)~~(5) A state agency or the governing body may compensate unsuccessful applicants for costs incurred  
 10 in developing and submitting a proposal, provided that all unsuccessful applicants are treated equitably.

11

12 **Section 4.** Section 7-5-2301, MCA, is amended to read:

13 **"7-5-2301. Competitive, advertised bidding required for certain large purchases or construction**  
 14 **contracts.** (1) Except as provided in 7-5-2304 and [sections 1 through 3], a contract for the purchase of any  
 15 vehicle, road machinery or other machinery, apparatus, appliances, equipment, or materials or supplies or for  
 16 construction, repair, or maintenance in excess of \$50,000 may not be entered into by a county governing body  
 17 without first publishing a notice calling for bids.

18 (2) The notice must be published as provided in 7-1-2121.

19 (3) Subject to 7-5-2309 and except as provided in [sections 1 through 3], every contract subject to  
 20 bidding must be let to the lowest responsible bidder."

21

22 **Section 5.** Section 7-5-4302, MCA, is amended to read:

23 **"7-5-4302. Competitive, advertised bidding required for certain purchase and construction**  
 24 **contracts.** (1) Except as provided in 7-5-4303, ~~or~~ 7-5-4310, or [sections 1 through 3], all contracts for the  
 25 purchase of any automobile, truck, other vehicle, road machinery, other machinery, apparatus, appliances,  
 26 equipment, or materials or supplies of any kind in excess of \$20,000 or for construction, repair, or maintenance  
 27 in excess of \$25,000 must be let to the lowest responsible bidder after advertisement for bids.

28 (2) The advertisement must be published as provided in 7-1-4127, and the second publication must be  
 29 made not less than 5 days or more than 12 days before the consideration of bids. If the advertisement is made  
 30 by posting, 15 days must elapse, including the day of posting, between the time of the posting of the

1 advertisement and the day set for considering bids.

2 (3) The council may:

3 (a) postpone ~~action on any~~ awarding a contract until the next regular meeting after bids are received

4 in response to the advertisement;

5 (b) ~~and may~~ reject any or all bids; and

6 (c) readvertise as provided in this section."

7

8 **Section 6.** Section 18-1-102, MCA, is amended to read:

9 **"18-1-102. State contracts to lowest bidder -- reciprocity.** (1) In order to provide for an orderly  
10 administration of the business of the state of Montana in awarding public contracts for the purchase of goods  
11 and for construction, repair, and public works of all kinds, a public agency shall, except as provided in [sections  
12 1 through 3], award:

13 (a) a public contract for construction, repair, or public works to the lowest responsible bidder without  
14 regard to residency. However, a resident bidder must be allowed a preference on a contract against the bid of  
15 a nonresident bidder from any state or country that enforces a preference for resident bidders. The preference  
16 given to resident bidders of this state must be equal to the preference given in the other state or country.

17 (b) a public contract for the purchase of goods to the lowest responsible bidder without regard to  
18 residency. However, a resident must be allowed a preference on a contract against the bid of a nonresident if  
19 the state or country of the nonresident enforces a preference for residents. The preference must be equal to the  
20 preference given in the other state or country.

21 (2) The preferences in this section apply:

22 (a) whether the law requires advertisement for bids or does not require advertisement for bids; and

23 (b) to contracts involving funds obtained from the federal government unless expressly prohibited by  
24 the laws of the United States or regulations adopted pursuant to federal laws."

25

26 **Section 7.** Section 18-2-103, MCA, is amended to read:

27 **"18-2-103. Supervision of construction of buildings.** (1) For the construction of a building costing  
28 more than \$150,000, the department shall:

29 (a) review and accept all plans, specifications, and cost estimates prepared by architects or consulting  
30 engineers;

1 (b) approve all bond issues or other financial arrangements and supervise and approve the expenditure  
2 of all money;

3 (c) solicit, accept, and reject bids and, except as provided in [sections 1 through 3], award all contracts  
4 to the lowest qualified bidder considering conformity with specifications and terms and reasonableness of the  
5 bid amount;

6 (d) review and approve all change orders; and

7 (e) accept the building when completed according to accepted plans and specifications.

8 (2) The department may delegate on a project-by-project basis any powers and duties under subsection  
9 (1) to other state agencies, including units of the Montana university system, upon terms and conditions specified  
10 by the department.

11 (3) Before a contract under subsection (1) is awarded, two formal bids must have been received, if  
12 reasonably available.

13 (4) The department need not require the provisions of Montana law relating to advertising, bidding, or  
14 supervision when proposed construction costs are \$75,000 or less. However, with respect to a project having  
15 a proposed cost of \$75,000 or less but more than \$25,000, the agency awarding the contract shall procure at  
16 least three informal bids from contractors registered in Montana, if reasonably available.

17 (5) For the construction of buildings owned or to be owned by a school district, the department shall,  
18 upon request, provide inspection to ensure compliance with the plans and specifications for the construction of  
19 the buildings. "Construction" includes construction, repair, alteration, equipping, and furnishing during  
20 construction, repair, or alteration. These services must be provided at a cost to be contracted for between the  
21 department and the school district, with the receipts to be deposited in the department's construction regulation  
22 account in a state special revenue fund.

23 (6) It is the intent of the legislature that student housing and other facilities constructed under the  
24 authority of the regents of the university system are subject to the provisions of subsections (1) through (3).

25 (7) The department of military affairs may act as the contracting agency for buildings constructed under  
26 the authority of 18-2-102(2)(d). However, the department of administration may agree to act as the contracting  
27 agency on behalf of the department of military affairs. Montana law applies to any controversy involving a  
28 contract."

29

30 **Section 8.** Section 18-4-124, MCA, is amended to read:

1           **"18-4-124. Local government adoption of procurement provisions -- alternative project delivery**  
 2 **contracts.** (1) A political subdivision or school district may adopt any or all parts of this chapter and the  
 3 accompanying rules promulgated by the department.

4           (2) A governing body, as defined in [section 1], may adopt the provisions of [sections 1 through 3] and  
 5 use an alternative project delivery contract."  
 6

7           **Section 9.** Section 20-6-606, MCA, is amended to read:

8           **"20-6-606. Letting contracts for school facilities.** Any letting of contracts related to the construction  
 9 or furnishing of a new, enlarged, remodeled, or repaired building ~~shall~~ must be conducted under the provisions  
 10 of 20-9-204 or [sections 1 through 3]."  
 11

12           **Section 10.** Section 20-9-204, MCA, is amended to read:

13           **"20-9-204. Conflicts of interests, letting contracts, and calling for bids.** (1) It is unlawful for a trustee  
 14 to:

15           (a) have any pecuniary interest, either directly or indirectly, in any contract made by the trustee while  
 16 acting in that official capacity or by the board of trustees of which the trustee is a member; or

17           (b) be employed in any capacity by the trustee's own school district.

18           (2) For the purposes of subsection (1):

19           (a) "pecuniary interest" does not include holding an interest of 10% or less in a corporation;

20           (b) "contract" does not include:

21           (i) merchandise sold to the highest bidder at public auctions;

22           (ii) investments or deposits in financial institutions that are in the business of loaning or receiving money  
 23 when the investments or deposits are made on a rotating or ratable basis among financial institutions in the  
 24 community or when there is only one financial institution in the community; or

25           (iii) contracts for professional services, other than salaried services, or for maintenance or repair services  
 26 or supplies when the services or supplies are not reasonably available from other sources if the interest of any  
 27 board member and a determination of the lack of availability are entered in the minutes of the board meeting  
 28 at which the contract is considered.

29           (3) Except for district needs that must be met because of an unforeseen emergency, as defined in  
 30 20-3-322(5), or as provided in subsection (4) of this section, whenever the estimated cost of any building,

1 furnishing, repairing, or other work for the benefit of the district or purchasing of supplies for the district exceeds  
 2 the sum of \$25,000, the work done or the purchase made must be by contract. ~~Each~~ Except as provided in  
 3 [sections 1 through 3], each contract must be let to the lowest responsible bidder after advertisement for bids.  
 4 The advertisement must be published in the newspaper that will give notice to the largest number of people of  
 5 the district as determined by the trustees. The advertisement must be made once each week for 2 consecutive  
 6 weeks, and the second publication must be made not less than 5 days or more than 12 days before  
 7 consideration of bids. A contract not let pursuant to this section is void. The bidding requirements applicable to  
 8 services performed for the benefit of the district under this section do not apply to:

- 9 (a) a registered professional engineer, surveyor, real estate appraiser, or registered architect;
- 10 (b) a physician, dentist, pharmacist, or other medical, dental, or health care provider;
- 11 (c) an attorney;
- 12 (d) a consulting actuary;
- 13 (e) a private investigator licensed by any jurisdiction;
- 14 (f) a claims adjuster; ~~or~~
- 15 (g) an accountant licensed under Title 37, chapter 50; or
- 16 (h) a project, as defined in [section 1], for which a governing body, as defined in [section 1], enters into  
 17 an alternative project delivery contract pursuant to [sections 1 through 3].

18 (4) A district may enter into a cooperative purchasing contract for the procurement of supplies or  
 19 services with one or more districts. The award of a contract to a successful bidder must comply with the  
 20 requirements of subsection (5). The request for bids must be advertised in a daily newspaper of general  
 21 circulation in each county in which a district participating in the cooperative purchasing contract is located. The  
 22 advertisement must be made once each week for 2 consecutive weeks, and the second publication must be  
 23 made not less than 5 days or more than 12 days before consideration of bids.

24 (5) ~~Whenever~~ Except as provided in [sections 1 through 3], whenever bidding is required, the contract  
 25 must be awarded to the lowest responsible bidder, except that any or all bids may be rejected.

26 (6) This section may not require the board of trustees to let a contract for any routine and regularly  
 27 performed maintenance or repair project or service that can be accomplished by district staff whose regular  
 28 employment with the school district is related to the routine performance of maintenance for the district."  
 29

30 **Section 11.** Section 67-11-201, MCA, is amended to read:

1           **"67-11-201. General powers of authority.** An authority has all the powers necessary or convenient  
2 to carry out the purposes of this chapter, including, subject to 15-10-420, the power to certify annually to the  
3 governing bodies creating it the amount of tax to be levied by the governing bodies for airport purposes.  
4 Authority powers include but are not limited to the power to:

5           (1) sue and be sued, have a seal, and have perpetual succession;

6           (2) execute contracts, including alternative project delivery contracts as provided for in [sections 1  
7 through 3], and other instruments and take other action that may be necessary or convenient to carry out the  
8 purposes of this chapter;

9           (3) plan, establish, acquire, develop, construct, purchase, enlarge, improve, maintain, equip, operate,  
10 regulate, and protect airports and air navigation facilities, within this state and within any adjoining state,  
11 including the acquisition, construction, installation, equipment, maintenance, and operation at the airports or  
12 buildings and other facilities for the servicing of aircraft or for comfort and accommodation of air travelers and  
13 the purchase and sale of supplies, goods, and commodities that are incident to the operation of its airport  
14 properties. For the authorized purposes, an authority may, by purchase, gift, devise, lease, eminent domain  
15 proceedings pursuant to Title 70, chapter 30, or otherwise, acquire property, real or personal, or any interest in  
16 property, including easements in airport hazards or land outside the boundaries of an airport or airport site, that  
17 is necessary to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards  
18 or to prevent the establishment of airport hazards.

19           (4) establish comprehensive airport zoning regulations in accordance with the laws of this state;

20           (5) acquire, by purchase, gift, devise, lease, eminent domain proceedings, or otherwise, existing airports  
21 and air navigation facilities. However, an authority may not acquire or take over any airport or air navigation  
22 facility owned or controlled by another authority, a municipality, or a public agency of this or any other state  
23 without the consent of the authority, municipality, or public agency.

24           (6) establish or acquire and maintain airports in, over, and upon any public waters of this state or any  
25 submerged lands under public waters, provided that the authority has obtained the approval of the owner or  
26 agency that controls the water, and construct and maintain terminal buildings, landing floats, causeways,  
27 roadways, and bridges for approaches to or connecting with any airport and landing floats and breakwaters for  
28 the protection of the airport."

29

30           NEW SECTION. **Section 12. Codification instruction.** [Sections 1 through 3] are intended to be

1 codified as an integral part of Title 18, chapter 2, and the provisions of Title 18, chapter 2, apply to [sections 1  
2 through 3].

3 - END -